Supreme Court, U.S.
FILED
JUN - 7 2000
CLERK

(5)

No. 99-905

In The

Supreme Court of the United States

ARMSTRONG SURGICAL CENTER, INC.,

Petitioner,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

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June 7, 2000

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SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

The Solicitor General's response to the Court's invitation to present the views of the United States reflects the same profound ambiguity that characterizes the case law concerning the question presented in the petition, *viz.*, whether there is a fraud exception to the *Noerr-Pennington* and state action doctrines in antitrust law. The government acknowledges that the issue is an important one, that this Court's decisions are contradictory on this core question and that the courts of appeals are equally in conflict about the correct rule of law. Each of these points traditionally is enough, by itself, to warrant certiorari; the presence of all three considerations favoring review by this Court on an issue overwhelmingly supports granting the petition. Although the Solicitor General comes tantalizingly close to urging certiorari, ultimately he backs off that recommendation. For several reasons, he suggests that the issue should be permitted to percolate further before it is addressed by this Court. In this supplemental brief, we address the government's reservations and demonstrate that this case is an excellent vehicle for resolution of the broad, well-developed conflict among the court of appeals on the substantial issue presented here.

Petitioner Armstrong Surgical Center ("Armstrong") alleged that respondents had conspired to restrain trade and preserve their respective monopolies in the market for outpatient surgery and associated medical services in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Armstrong alleged that the Hospital and physicians improperly opposed Armstrong's application to the State Department of Health for the certificate of need

("CON") required for construction of a new outpatient surgery center. The Hospital informed the State that it planned to construct a new building and to move three operating rooms there for use in outpatient surgery, and the physicians (who performed more than 73% of the outpatient surgery and 90% of the surgery in the market) informed the State that they would use *only* the Hospitals' facility and not petitioner's. Critically, in its complaint, Armstrong alleged that when the Hospital and the physicians made their respective representations to the State they knew that construction on the Hospital facility had stopped; that the Hospital had no intention of completing construction or opening its own outpatient surgery facility if Armstrong's application were defeated; and that respondents' misrepresentations were the "controlling factors" in the State's decision to deny a CON. See Complaint ¶¶ 12, 13, 17-19, 21, 22, 24, 25, 31, 34-37. As the Third Circuit explained, petitioner claimed that respondents were not entitled to *Noerr-Pennington* immunity because their successful opposition to the State's issuance of a CON was the result of their "us[e] of information known to be false." Pet. App. 12a.

The Third Circuit affirmed the dismissal of petitioner's Complaint, holding categorically that respondents were entitled to *Noerr-Pennington* immunity even if they procured denial of the CON by virtue of knowing misrepresentations. See Pet. App. 17a ("injuries that are inflicted by states acting as regulators" do not give rise to antitrust liability "even where it is alleged that a private party urging the action did so by bribery, deceit, or other wrongful conduct that may have affected the decision-making process"); *id.* at 21a ("the majority holds private parties who make misrepresentations that pervasively

influence the decision-making process of public entities are entitled to immunity under both the state action immunity doctrine and the *Noerr-Pennington* immunity doctrine").

1. The court of appeals expressly acknowledged that its decision conflicts with decisions of the courts of appeals for the Ninth, Eleventh, and Sixth Circuits. See Pet. App. 19a n.7 (citing *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998) (acknowledging exception to *Noerr* immunity where misrepresentations occur), *cert. denied*, 525 U.S. 1140 (1999); *St. Joseph's Hosp.* v. *Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986) ("When a governmental agency . . . is passing on specific [CON] applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity."); *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 580 (6th Cir. 1986) ("knowing and willful submission of false facts to a government agency falls within the sham exception")). The government, too, recognizes that there is a conflict among the circuits. Gov't Br. 14. Indeed, the government points out that the conflict is broader than acknowledged by the court of appeals, citing *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association*, 663 F.2d 253, 262-66 & n.7 (D.C. Cir. 1981); and *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir. 1970). The Ninth Circuit's recent acknowledgement of the fraud and misrepresentation exception to *Noerr-Pennington* immunity, see *Liberty Lake Investments, Inc.* v. *Magnuson*, 12 F.3d 155, 158-59 (9th Cir. 1993), as well as the Third

Circuit's recent decisions in the instant case and in *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir.) (granting *Noerr-Pennington* immunity because "the alleged misrepresented facts do not infect the core of [the plaintiff's] claim and the government's resulting actions"), *cert. denied*, 120 S. Ct. 173 (1999), demonstrate that this issue remains the subject of a broad conflict and is recurring.

The government's analysis of this Court's cases, as well as court of appeals' cases cited by the government, also demonstrates that, while this Court has never decided whether government action procured through factual misrepresentations to an adjudicatory decision-maker are entitled to antitrust immunity, its decisions provide "some support" for petitioner. Gov't Br. 11. Most recently, in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries*, 508 U.S. 49 (1993) (*"PREI"*), this Court highlighted its previous statements that " '[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.' " *Id.* at 61 n.6 (alteration in original) (quoting *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972)). The Court then expressly reserved the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* See also *California Motor Transport*, 404 U.S. at 513 (there are "forms of illegal and reprehensible practice," including "[m]isrepresentations" that may "corrupt the administrative or judicial processes" and "result in antitrust violations"); *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 504 (1988) ("A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena."); *Walker Process*

Equip., Inc. v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) (proof that a patent-holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office . . . would be sufficient to strip [the holder] of its exemption from the antitrust laws" for any "injurious consequences . . . of the patent's enforcement"). But see *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 378 (1991) (holding that misrepresentations in the legislative arena do not eliminate antitrust immunity for petitioning activity).

2. The primary thrust of the government's brief, accordingly, shows that there is a conflict among the courts of appeals on the important and substantial issue presented by the petition in this case and that this Court's decisions have given the lower courts mixed signals about the scope of *Noerr-Pennington* immunity when misrepresentations are made in the adjudicatory context. The logical and typical conclusion that follows these observations is that review by this Court is plainly warranted. For several reasons, however, the government nonetheless believes that this Court should defer consideration of the issue and allow it to percolate further. We now show that the government's doubts are unwarranted.

a. The government first points out that "[m]ost of the cases cited were decided before *PREI* and *Omni*," Gov't Br. 15, and suggests that this fact may account for the conflict in the courts of appeals. This is plainly wrong. *PREI* itself reserves the question presented here, and reaffirms the statement in *California Motor Transport* that " '[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.' " 508 U.S. at 61 n.6 (alteration in original). See *supra* at 4. And, *PREI* was decided after *Omni*, which, as the dissent below discusses at length, arose in the context

of *legislative petitioning*, and not, as here, a petition to an adjudicatory body. See Pet. App. 27a-30a. These decisions can only exacerbate, not resolve, the conflict among the courts of appeals. Indeed, that fact is demonstrated by the conflicting decisions on the issue presented since *Omni* and *PREI* were decided. See *id.* at 1a; *Liberty Lake Investors*, 12 F.3d at 158-59; *Cheminor*, 168 F.3d at 123; *Whelan*, 48 F.3d at 1255.

b. The government next weakly suggests that a couple of the cases that make up the conflict (but, by no means, all) might be distinguishable on their facts. Gov't Br. 16. In neither case does the suggested distinction diminish the conflict. The court of appeals held that a fraudulent misrepresentation made to an adjudicatory body would not eliminate *Noerr-Pennington* immunity. In both cases cited by the government, *St. Joseph's Hosp.*, 795 F.2d at 953, and *Woods Exploration*, 438 F.2d at 1292-93, the courts of appeals adopted a directly contrary view.

c. The government also suggests that the Third Circuit's decision may have been affected by the fact that this case involved " 'disinterested decision-makers' " and an open process with opportunities to correct errors that were made, Gov't Br. 16, implying that any actual misrepresentation would have been uncovered by the process. This suggestion first ignores the procedural posture of the case. The court of appeals was reviewing and affirmed dismissal of a complaint alleging that respondents procured a denial of a CON to Armstrong by knowingly making misrepresentations to the adjudicatory body. Necessarily, then, the court of appeals assumed that the facts alleged by Armstrong were true and nonetheless decided that it had failed to state a claim for relief because the facts as alleged conferred antitrust immunity

on respondents. Pet. App. 2a, 40a-41a. Second, the supposedly unique traits of the process at issue here – the disinterested decision-maker, the open process, the opportunity for error correction – are characteristics shared by virtually all adjudicatory proceedings, most notably the judicial process and by many of the processes at issue in the cases cited above. There is nothing about the adjudicatory process here that makes this case an inappropriate vehicle for deciding whether misrepresentations in an adjudicatory process deprive their author of antitrust immunity. See also *id.* at 31a, 37a-41a.

d. Fourth, the government wonders whether there should ever be antitrust liability "that would allow a plaintiff to recover damages from a private defendant for competitive injuries caused most directly by state administrative or adjudicatory action, such as the denial of a CON." Gov't Br. 16. The government first correctly points out that the State itself could not be held liable. But, of course, petitioner has not sought damages from the State; instead, it has simply claimed that respondents should not be entitled to immunity from the antitrust laws based on state action they procured through deceit. The question of how the damage that Armstrong suffered as a result of respondents' antitrust violations should be measured is entirely separate from the question whether respondents are immune. Questions related to the damages calculation should be raised and resolved once it is determined that respondents are not immune from the antitrust laws. Indeed, as the government points out, "[c]ases allowing a plaintiff to seek damages from private parties for injuries caused by wrongfully procured sovereign actions are not unknown." *Id.* at 18-19 (citing and describing cases).

But, the government worries, the determination of Armstrong's damages will require " 'look[ing] behind the actions of state sovereign.' " Gov't Br. 17 (alteration in original) (quoting *Omni*, 499 U.S. at 379). This concern is premature, as noted, but it is far from clear that it is even valid. A determination that a state action was procured by fraud or misrepresentation simply eliminates the antitrust immunity otherwise conferred by state action that establishes or fosters conduct contrary to the antitrust laws. The subsequent measurement of damages does not require an examination of the state's decision-making process, but instead the calculation of a plaintiff's loss as a result of the private defendant's conduct (here the wrongful denial of the CON). That inquiry does not require any examination of the unstated reasons for the sovereign's decision. See also Gov't Br. 19 ("[t]here may be procedural mechanisms, such as discovery limitations, stays, and referral of questions to state agencies or courts, that could mitigate the concerns over practicality and comity expressed above"). Equally to the point, it is entirely appropriate to place the burden of demonstrating that the misrepresentation did not in fact cause any antitrust injury on the author of the misrepresentation. This is directly analogous to the task confronting the government when it argues that an error in a criminal prosecution was harmless or an employer who does not maintain employee time records and is charged with a failure to make sufficient hourly pension contributions.

The government also suggests that petitioner jumped the gun by filing an antitrust complaint instead of seeking redress from the State. Gov't Br. 20. This argument simply ignores the physicians' concerted refusal to deal. Even if petitioner had succeeded in obtaining the CON, it

remained the case that physicians exercising monopoly power already had made clear their intention to boycott petitioner's facility. As a consequence, it would have been financial madness for petitioner to open the surgical center even if the State had issued the CON at that point. Thus, requiring petitioner to pursue an inherently incomplete and ultimately futile remedy as a precondition of having its antitrust issue resolved rewards respondents' misconduct in a manner that is wholly unjustified.

e. Finally, the government concludes that this case may not be an appropriate vehicle to resolve the question presented because it involved an open process with opportunities for error correction and because the court of appeals indicated its uncertainty about whether the misrepresentation affected the state's decision. These alleged imperfections are imaginary. The alleged misrepresentations were made in the course of an adjudicatory process and plainly affected the state's decision. In fact, the Third Circuit has dismissed a complaint alleging that misrepresentations at issue directly determined the outcome of the state proceeding and resulted in the denial of the CON, holding that such allegations on their face showed that the respondent Hospital and physicians were entitled to antitrust immunity. The question could not be more cleanly presented.

At the end of the day, respondents' conduct as alleged is reprehensible. It is a gross understatement to suggest that "[i]ntentional fraud on state courts or administrative tribunals can lay only a modest claim to the mantle of immunity" embodied in *Noerr*. Gov't Br. 19. Intentional fraud in an adjudicatory context that has both the intent and effect of causing a massive antitrust injury has no redeeming social value and most certainly is not

necessary to protect the First Amendment right to petition which is the source of *Noerr-Pennington* immunity. Cf. *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985) (holding that the right to petition does not immunize libelous statements made in a petition to the executive). Instead of waiting for the issue to "percolate," the Court should intervene now and decide whether the immunity from the antitrust laws is forfeited by the conduct alleged in this case. Compare *Walker Process Equip., Inc.*, 382 U.S. at 177-78. The Court should employ this opportunity to decide the very question it reserved in *PREI*: "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." 508 U.S. at 61 n.6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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